CASE NUMBER 88-231

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1988 TERM

N & C PROPERTIES; NEDA, INC. OF DESTIN; AND CHANCELLOR LAND CO., INC.,

PETITIONERS,

V.

CHARLES D. PRITCHARD, ET AL,

RESPONDENTS.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

Charles D. Cleveland
Admitted to practice in this court on May 4, 1964

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COUNSEL FOR PETITIONERS

QUESTIONS PRESENTED

1. Is a high-rise condominium apartment building a subdivision of land which is required to be registered with the Secretary of Housing and Urban Development pursuant to the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701, et seq.?

2. Does the 100 lot exemption in 15 U.S.C. § 1702(b)(1) exempt a 55 unit condominium where the developers have an option to add a second phase containing up to 46 units, but have never formulated a plan to market the second phase and its units have never been offered for sale?

LIST OF PARTIES BEFORE THE ALABAMA SUPREME COURT

The respondents and plaintiffs in this case are: Charles D. Pritchard, Alton O. Foster, Donald L. Johnson and Kathy D. Johnson.

The petitioners and defendants in this case are: N & C Properties, a joint venture composed of Chancellor Land Company, Inc., and Neda, Inc. of Destin.

Chancellor Land Company, Inc. is a subsidiary of Comet Properties, Inc., which has no other subsidiaries or affiliates. Neda, Inc. of Destin has no parent, subsidiary, or affiliated corporations.

SouthTrust Bank of the Quad Cities, First National Bank of Florence, Gulf South Corridor Properties, Inc., Vanguard Bank and Trust Company, and Citizens & Southern National Bank

were defendants in the trial court but were dismissed after the court denied a preliminary injunction against them. They were not parties to the appeal in the Alabama Supreme Court and are not parties to this petition for writ of certiorari.

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OPINION BELOW

The opinion of the Supreme Court of Alabama is reported at 525 So.2d 1346 (Ala. 1988) and 1988 Ala. LEXIS 39. The appendix hereto contains the opinion of the Supreme Court of Alabama and the notice of denial of rehearing.

JURISDICTION

The Alabama Supreme Court, which is the highest court of the State of Alabama, entered judgment on January 29, 1988. A timely application for rehearing, filed on February 12, 1988, was denied on April 22, 1988. This court has jurisdiction to review the judgment under 28 U.S.C. § 1257(3), because the rights of the parties are set up and claimed under the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701, et seq. The judgment of the Alabama Supreme Court decided significant federal questions by applying and interpreting

the Act to the facts in this case.

STATUTES AND REGULATIONS

The statutes involved in this case are lengthy and are set out in full in the appendix at page A-21. They are: 15 U.S.C. §§ 1701(3), 1701(4), 1701(11), 1702(b)(1), 1703(a)(1)(A) and (B), 1704(a), 1705 and 1709(a).

STATEMENT OF THE CASE

The petitioners developed East Pass Towers, Phase I, a six-story residential apartment building located in Destin, Florida, in which the 55 apartments were sold as condominium units. Petitioners complied with the applicable local and state laws and regulations, but did not register the project with the Secretary of Housing and Urban Development pursuant to 15 U.S.C. § 1704(a).

After approval had been obtained from the Department of Business Regulation of the State of Florida, the condominium units were offered for pre-construction sale. Florida Statutes § 718.502; Rules of the Department of Business Regulation, 7D-17.01(b). In accordance with customary practice, the construction lender required that at least 50% of the units be pre-sold prior to construction. The respondents signed three pre-construction contracts to

purchase apartments and were given copies of the condominium documents as required by Florida Statutes §§ 718.503 and 718.504. In lieu of a down payment, they deposited letters of credit issued by Florence, Alabama banks with the escrow agent, who was required by Florida law to hold the down payments until closing. Florida Statutes § 718.202. Petitioners completed the construction and obtained certificates of occupancy from the local authorities and final approval from the Department of Business Regulation.

When the petitioners called on the respondents to close, the respondents filed suit in the Circuit Court of Lauderdale County, Alabama, requesting the court to enjoin the Florence banks from funding the letters of credit. A preliminary injunction was denied and the amounts of the letters of credit were paid to the escrow agent in Florida. All of

the defendants, except the petitioners, were dismissed. The respondents then amended their complaint alleging that they were entitled to rescission because of the failure of the petitioners to comply with the disclosure provisions of the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1703.

Petitioners contended that the condominium apartment building was not a subdivision of "land" within the meaning of 15 U.S.C. § 1701(3) and that the Act did not apply. Alternatively, petitioners contended that the project consisted of less than 100 units and was exempt pursuant to 15 U.S.C. § 1702(b)(1).

After considering conflicting affidavits and the testimony taken at the injunction hearing, the Circuit Court granted the petitioners summary judgments totaling $98,320. The judgments were based solely on the court's determination that the respondents were

entitled to relief under the federal statute. On appeal the Alabama Supreme Court affirmed and denied a timely application for rehearing. The court followed the Eleventh Circuit decision in *Winter v. Hollingsworth Properties*, Inc., 777 F.2d 1444 (11th Cir. 1985), which held that an apartment in a building sold as a condominium was a "lot" which required the project to be registered pursuant to the Act. The court also held that the 100-lot exemption did not apply because the petitioners had an option in the condominium documents to construct a second phase containing up to 46 units, and even though they were never offered for sale, they were part of a "common promotional plan" within the meaning of 15 U.S.C. § 1701(4).

REASONS FOR GRANTING THE WRIT

A High Rise Apartment Condominium Is Not A Subdivision Of Land Covered By The Interstate Land Sales Full Disclosure Act.

The Interstate Land Sales Full Disclosure Act was passed by Congress to "prevent false and deceptive practices in the sale of unimproved tracts of land by requiring developers to disclose information needed by potential buyers." *Flint Ridge Devel. v. Scenic Rivers Ass'n. of Okla.*, 426 U. S. 776, 49 L.Ed.2d 305, 96 S.Ct. 2430 (1976) Prior to selling any lot, a developer must register a subdivision by filing a statement of record with the Secretary of Housing and Urban Development, and furnish a property report to the purchaser. 15 U.S.C. § 1703(a)(1). The term "lot" is not defined, but "subdivision" means any land which...is divided or proposed to be divided into lots..." (Emphasis added.) 15 U.S.C. § 1701(3)

The Act does not expressly require the

registration of a building in which portions of it are sold as condominium units and the legislative history indicates that Congress did not intend such a requirement. It is clear that Congress was only concerned with the sale of unimproved land. In their statements, Senator Fulbright, who introduced the Act, and Senator Williams, said that it only applied to "undeveloped" land. 114 Cong. Rec. pp. 15270-15271 (daily ed. May 28, 1968).

When Congress amended the Act in 1978 it considered several alternatives and plans. One plan put forth by HUD to regulate new condominium developments as well as conversions was rejected. The Senate Subcommittee on Housing and Urban Affairs said:

> ...Federal intervention concerning consumer protection and disclosure for new condominiums and cooperatives is not required and would create unnecessary confusion in this sphere of commerce.

S. Rep. 96 Cong. 1st Sess., 3. reprinted in

1978 U.S.Code Cong. & Ad. News at 3555.

Also, the Senate Committee on Banking, Housing and Urban Affairs held hearings to consider amending the Act. In those hearings, Alan J. Kappeler, Associate Administrator for the Office of Interstate Land Sales Regulation testified. He stated:

> We've (the Office) never tried or desired to police the condominium industry, as most people recognize the condominium industry as building high-rise apartment buildings. We are concerned about any attempt to create an exemption that's a blanket form of exemption for condominium ownership, where you could mass market unimproved lots across State lines that are sold under the condominium form of ownership.

Interstate Land Sales Program: Hearing on S. 2716 before the Senate Committee on Banking, Housing and Urban Affairs, 95 Cong. 2nd Sess. at 79 (1978); see, 124 Cong. Rec., pp. 7008-7012 (daily ed. March 15, 1978) (statement of Senator Nelson).

However, a majority of the courts that

have considered this issue have interpreted the Act to require registration of condominiums such as the one in this case. *Winter v. Hollingsworth Properties, Inc.* 777 F.2d 1444 (11th Cir. 1985), reversing 587 F.Supp. 1289 (SD Fla. 1984), *Marco Bay Assoc. v. Vandewalle*, 472 So.2d 472 (Fla. App. 2 1985); *Navgiz v. Henloper Developers*, 380 A. 2nd 1361 (Del. 1977). This court has not considered this important issue, but should do so in this case.

As a result of the accelerated use of condominiums as a form of ownership of real estate in recent years, all 50 states, the District of Columbia, Puerto Rico and the Virgin Islands have adopted statutes specifically regulating their development. 15A Am Jur 2d Condominiums §9. City and county planning and zoning regulations may be applicable. 15A Am Jur 2d Condominiums §23. Congress has regulated certain conversions of apartments

into condominiums, but specifically refused to regulate the sale of new condominiums. S. Rep. 96 Cong. 1st Sess., 3, reprinted in 1978 U.S.Code Cong. & Ad. News at 3555; Condominium Conversion Protection and Abuse Relief Act, 15 U.S.C. §3601, et seq.

The procedure followed by the developers in this case is typical of numerous similar developments throughout the country. In addition to obtaining prior approval of the plans and specifications by local authorities, all of the condominium documents were approved by the Department of Business Regulation of the State of Florida prior to construction. This approval permitted pre-construction sales which were required by the construction lender. Pursuant to the Florida statute, all pre-construction purchasers were furnished copies of the condominium documents, and the down payments on pre-construction sales were

deposited with an approved escrow agent. The sales could not be closed until construction was completed and a certificate of occupancy for the building obtained from the local authorities.

While the state and local laws are designed specifically for the development of condominiums, the federal statute was designed to regulate the sale of lots in a subdivision of "land". It can only be applied to a condominium such as the one in this case by a dubious analogy. See, *Gerber v. Town of Clarkstown*, 78 Misc. 2d 221; 356 N.Y.S. 2d 926 (1979). The building plans are somewhat analogous to a subdivision plot, and an apartment could be called a three-dimensional "lot". However, many of the provisions required in the statement of record relate only to land, and have no counterpart in a high-rise building. See, 15 U.S.C. § 1705; *Winter v.*

Hollingsworth Properties, Inc., 387 F. Supp. 1289 (SD Fla. 1984, pp. 1293, 1294) For example, 15 U.S.C. § 1705(2) requires a statement of the total area in the subdivision and a statement of the topography thereof, together with a map showing the division proposed and the dimensions of the lots. The regulations require the developer to answer the question, "Has each lot been surveyed?" 24 C.F.R. § 1710-07(g)(3). Conversely, the federal statute does not require disclosures which a developer should be required to give the purchaser of a condominium unit and which the state laws generally require. For example, compare the disclosures required by 15 U.S.C. § 1705 with Florida Statutes §§ 718.503 and 718.504.

A House committee considering PL-96-153, which amended the Act, noted that there was no need to establish national standards of

disclosure and protection for condominiums because the states were taking adequate steps to regulate the development of condominiums. H.R. Rep. No. 154, 96 Cong. 1st Sess., 2, reprinted in 1979 U.S.Code Cong. & Ad. News at 2345. The effect of applying the federal law will be to invalidate all of the pre-construction sale contracts unless the project was registered with HUD, even though such registration does not give the purchaser any additional protection or serve any useful purpose.

Even though Congress has given state courts concurrent jurisdiction with the federal courts in enforcing the provisions of the Act, the application of the statute to condominiums will necessarily greatly add to the case load of the already overburdened federal courts.

Whether a developer should incur the additional expense for the redundant filing

with HUD, or risk the possible invalidation of pre-construction contracts, is a question of vital importance to the real estate industry in the nation. This question should be decided by this court.

Denial Of The 100-Lot Exemption Conflicts With The Decisions Of Other States

The court's denial of the 100-lot exemption in this case is inconsistent with the cases of *Dunaway v. Lewis*, 545 P.2d 110 (Okla. 1976) and *Grove Towers v. Lopez*, 467 So.2d 358 (Fla. 3d Dist. Ct. App.), cert. denied 480 So.2d 1294 (Fla. 1985). If the Act is construed to apply to the condominium in this case, this court should resolve the conflicts.

In *Dunaway*, the court affirmed a judgment rendered in accordance with a jury verdict determining that two subdivisions were not sold as a part of a common promotional plan. In defining the burden of proof, the court held

that the plaintiff must prove that the lots in one subdivision were "offered for sale or lease as part of a common promotional plan" with the other subdivision. 545 P.2d 112. This holding is supported by advisory rulings by the Office of Interstate Land Sales Registration in *Sun Mountain,* OILSR No. 1-0939-05-90 (11-7-83), 1 Development Reporter I-B-406; *Paradise Point,* OILSR No. 1-0762-43-74 (7-28-83), 1 Development Reporter I-B-249; and *River Road, Phase II,* OILSR No. 1-0770-46-08 (9-25-81), 1 Development Reporter I-B-266. The court in this case held that the fact that the petitioner had not offered any of the units in the optional Phase II for sale was irrelevant.

In *Grove Towers,* the court, considering a condominium formed under the same Florida statute as the one in this case, held that the number of units which had been approved by the state for sale at the time the plaintiffs

signed the contract was controlling. It is undisputed that, at the time the respondents signed the contracts in this case, the project consisted of only 55 units. Clearly, the court's decision in this case is inconsistent with the Oklahoma and Florida cases, and this court should resolve the conflict and clarify the exemption as guidance to the state and federal courts which have concurrent jurisdiction of this issue.

In 1979, Congress increased the number of lots required for the exemption from 50 to 100, and excluded lots that were exempt from the computation. The purpose of this amendment was to relieve small businessmen from the expensive regulatory burdens. 124 Cong. Rec. pp. 7008-7012 (daily ed. March 15, 1978) (Statement of Senator Nelson); H.R. Rept. No. 154, 96 Cong. 1st Sess., 2, reprinted in 1979 U.S.Code Cong. & Ad. News at p. 2347. The court's decision in

this case produces the opposite result.

CONCLUSION

Petitioners respectfully request this court to grant a writ of certiorari to review the judgment and opinion of the Alabama Supreme Court.

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APPENDIX

OPINION OF ALABAMA SUPREME COURT
Filed January 29, 1988

THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1987-88

N & C Properties, et al.

85-1239 v.

Charles D. Pritchard, et al.

Appeal from Lauderdale Circuit Court

ALMON, JUSTICE.

Plaintiffs, Charles Pritchard, Alton Foster, Donald Johnson, and Kathy Johnson ("investors"), purchased condominium units (prior to the construction of those units) in a project known as East Pass Towers located in Destin, Florida. They sued N & C Properties, Chancellor Land Co., Inc., and Neda, Inc. ("developers"), under the Interstate Land Sales

Full Disclosure Act, 15 U.S.C. §§ 1701-1720 ("ILSFDA" or "the Act"), for failure to provide a written prospectus covering the development. The amended complaint was filed on September 25, 1985, and plaintiffs filed a motion for summary judgment on October 9. A hearing on the motion was set for November 1, but it was stayed pending a decision from the United States Court of Appeals for the Eleventh Circuit regarding whether the ILSFDA applied to condominium sales.

On November 6, 1985, the defendants filed a motion for partial summary judgment, contending that the ILSFDA did not apply to condominium sales. The hearing on the cross-motions was held March 20, 1986, and the court rendered its order on March 28. At the hearing the circuit court granted plaintiffs' motion for summary judgment and denied defendants' application for leave to file post-hearing affidavits dated

March 20. On June 20, 1986, the court rendered its final judgment in favor of the plaintiffs, granting them rescission of the condominium purchase agreements and awarding them attorney fees and amount paid as earnest money.

In October and November of 1983, each of the investors entered into pre-construction purchase agreements with N & C Properties for condominiums in East Pass Towers. The investors deposited letters of credit with N & C Properties, Inc., in the amounts of $27,920, $28,200, and $32,200, respectively. These letters of credit were to serve as security on the purchase price and were to be funded at the closing. The letters were ultimately funded by the investors' bank when the circuit court dissolved the temporary restraining order that had enjoined their payment and denied the investors' request for a preliminary injunction.

Although the condominium project was in accord with applicable Florida laws and administrative regulations, it is undisputed that the project did not comply with the disclosure requirements of the ILSFDA. Title 15 U.S.C. § 1703 (1982) states the requirements respecting the sale of lots under the act, as follows:

> "(a) It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails --
>
> > "(1) with respect to the sale or lease of any lot not exempt under section 1702 of this title --
> >
> > > "....
> > >
> > > "(B) to sell or lease any lot unless a printed property report, meeting the requirements of section 1707 of this title, has been furnished to the purchaser or lessee;"

That section essentially requires the developer to furnish a printed prospectus or property

report before the purchaser signs the purchase agreement. The Act requires disclosure of the names and addresses of all owners and promoters, the range of selling prices, a description of the land, disclosure of any encumbrances or easements, and other information relevant to the sale. The purpose of the prospectus requirement is to inform the buyer of the details of the offering and prevent fraud in the sale of subdivided real estate.

The developers' initial argument is that the ILSFDA does not apply to condominium sales. The crux of this argument is that a condominium unit is not a "lot" within the meaning of the Act. As can be seen from the quotation above, 15 U.S.C. § 1703(a)(1)(1982) makes the act applicable to "the sale or lease of any lot not exempt under section 1702 of this title." (Emphasis added.)

The United States Court of Appeals for the

Eleventh Circuit has addressed this very issue:

> "Congress did not draft the statute to apply solely to raw land, but made it applicable to the sale or lease of lots. The legislative history of the Act indicates that Congress was concerned with the sale of fairly large numbers of undeveloped lots pursuant to a common promotional plan. Cong.Rep. No. 1785, 90th Cong., 2d Sess. (1968), U.S.Code Cong. & Ad.News 3053, 3066. The legislative history also employs the terms 'land' and 'real estate.' Id. Although Congress may have been primarily concerned with the sale of raw land, it struck a balance by making the statute applicable to all lots and providing an exemption, not for all improved land, but for improved land on which a residential, commercial, condominium, or industrial building exists or where the contract of sale obligates the seller to erect such a structure within two years.
>
> "The key term that we must construe is 'lot' because the sale or lease of any non-exempt lot triggers the provisions of the Act. Lot is not defined anywhere in the ILSFDA. The Secretary of Housing and Urban Development (HUD) has defined lot, as part of a rule making proceeding completed in 1973, as 'any portion, piece, division, unit, or undivided interest in land ... if the interest includes the right to the exclusive use of a specific portion of the land.' 24 C.F.R. § 1710.1 (1987)."

Winter v. Hollingsworth Properties, 777 F.2d

1444 (11th Cir. 1985). (Footnotes omitted.)

That court also explained that the Secretary of Housing and Urban Development ("HUD") intended for the Office of Interstate Land Sales Regulation, the organization designated by the Secretary to administer the ILSFDA, to treat condominiums as the equivalent of subdivisions. The Secretary describes "condominium" as a description of ownership and not a mere structural description. 777 F.2d at 1447, citing 38 Fed. Reg. 23,866 (1973), 44 Fed. Reg. 24,012 (1979). This Court finds this reasoning persuasive, particularly in light of the various forms that condominiums now assume. We also note that §1702 of the ILSFDA exempts "the sale or lease of any improved land on which there is a residential, commercial, condominium, or industrial building, or the sale or lease of land under a contract obligating the seller or lessor to erect such a

building thereon within a period of two years." Although the developers do not claim such an exemption, we note in passing that the pre-construction sales contracts did not require construction of the project within two years as required for the statutory exemption. If the Act did not relate to the sale of condominiums, such an exemption would be unnecessary. See Winter, 777 F.2d 1444.

The developers contend that, even if the ILSFDA applies, the offering in question was of less than 100 units and was, therefore, exempt under 15 U.S.C. § 1702(b)(1). That section exempts from the registration and disclosure requirements of the Act "the sale or lease of lots in a subdivision containing fewer than one hundred lots which are not exempt under subsection (a) of this section." Each of the investors purchased a unit in a development known as East Pass Towers Phase I, a condo-

minium development containing 55 units. The developers contend that this offering was in no way related to East Pass Towers Phase II. They argue that Phase II was never formally offered for sale and that no condominium documents have yet been drafted. It is their contention, as developers of Phase I, that they had a mere option to build Phase II.

The investors, on the other hand, contend that East Pass Towers Phase I and Phase II are part of a common promotional plan and together constitute 101 units, bringing the development within the purview of the Act. A determination of applicability of the Act in the present instance requires a careful reading of the definitions in the Act. Section 1701(3) of the Act defines a "subdivision" as:

> "(A)ny land which is located in any State or in a foreign country and is divided or is proposed to be divided into lots, whether contiguous or not, for the purpose of sale or lease as part of a common promotional plan."

Secion (sic) 1701(4) defines "common promotional plan" as:

> "(A) plan, undertaken by a single developer or a group of developers acting in concert, to offer lots for sale or lease; where such land is offered for sale by such a developer or group of developers acting in concert, and advertised as a common unit or by a common name, such land shall be presumed, without regard to the number of lots covered by each individual offering, as being offered for sale or lease as part of a common promotional plan." (Emphasis added.)

Section 1701(11) defines "offer" as including "any inducement, solicitation, or attempt to encourage a person to acquire a lot in a subdivision."

The investors' argument below and on appeal is that the developers offered to sell units in Phase I and Phase II as a common plan of development. In support of their argument, they point to the following factors: (1) That Neda Inc., was formed to promote and sell units in both Phase I and Phase II; (2) The project was advertised, represented, and marketed as a

two-phase project consisting of two individual towers adjoining each other, Phase I containing 55 units and Phase II containing 46 units; and (3) The project was advertised and intended by the owners to be a two-phase project containing over 100 units. The investors offered the sworn testimony of Arthur Hill, president of Gulf South Corridor Properties, and Winston Biggs, president of Chancellor Land Company, Inc., in support of their claim during the hearing on March 20, 1986. The testimony of both men was that the development was advertised, represented, and marketed as a two-phase project containing two towers. The towers were to be adjacent to one another, sharing a common lobby and beach front. Mr. Biggs testified that the Johnsons were promised the opportunity to trade their Phase I unit for a nicer unit in Phase II when it was completed. He also testified, and it was undisputed by the

appellants, that none of the purchasers in this suit was presented with a prospectus prior to the execution of their pre-construction purchase agreements.

A prospectus covering the development was, however, prepared by the developers, and it was admitted into evidence at the March 20 hearing. It was denominated "East Pass Towers Condominium Declaration," with the cover depicting twin towers on the Destin coast. Phase I of the development was to be completed by June 1, 1992. The maximum number of units in the development was to be 101 "if, in the sole discretion of the developer, Phase II is built." The prospectus also said, "The developer has reserved the right to construct additional apartment buildings ... as part of this condominium at any time prior to June 1, 2002. ....The additional units to be contructed will be 46 in number and would be

contained in an additional apartment building." Advertising brochures admitted into evidence at the hearing also depicted twin towers joined by a common lobby.

The case of Grove Towers v. Lopez, 467 So.2d 358 (Fla. 3d Dist. Ct. App.), cert. denied, 480 So.2d 1294 (Fla. 1985), discusses the 100-lot exemption from the disclosure requirements of the ILSFDA. In that case, the developer claimed that its "intent" was to construct only 98 units, while the advertising brochures and the prospectus indicated that 108 units would be built. The Florida court held that mere intent to reserve an option to reduce the number of units in order to accomodate market demand was insufficient grounds to claim exemption under the statute. "As long as appellant wanted the option to build 108 units, it was obligated to comply (with the ILSFDA)". 467 So.2d at 361.

This is very similar to what occurred in the present case. Here, the developers contend that they did not offer to sell any units in Phase II and, therefore, that the entire development is exempt from the disclosure requirements of the statute. The statute itself defines "offer" as <u>any</u> inducement, solicitation, or attempt to encourage a person to acquire a lot. The relevant advertising brochures and sales representations referring to twin towers totaling 101 units are sufficient to constitute offers, inducements, or solicitations for the purposes of the ILSFDA. Such representations necessitated that appellants furnish a prospectus to an investor prior to the execution of any sales agreement.

This Court also agrees with the finding of the circuit court that Phase I and Phase II constitute a "common promotional plan." The statute says that any plan where the land is

known, designated, or advertised as a common unit or common name shall be presumed, without regard to the number of lots in a particular offering, to be part of a common promotional plan. 15 U.S.C. 1701(4). The fact that construction on Phase II had not yet begun or that it had not been "formally offered" for sale is irrelevant. The development of Phase II is presumed, under the Act, to be part of a common plan with Phase I. The developers cannot avoid application of the act simply by breaking the development into two smaller segments. See Eaton v. Dorchester Development, Inc. 692 F.2d 727 (11th Cir. 1982); Dunaway v. Lewis, 554 P.2d 110 (Okla. Ct. App. 1976).

Appellants next contend that the investors purchased the condominiums with the intent to resell them to developers and that the sales are, therefore, exempt from the disclosure requirements under 15 U.S.C. § 1702(a)(7). We

have searched the record below and have found no evidence whatsoever that the investors here intended to resell to developers. The federal regulations applicable to exemption from the ILSFDA provide, "If a developer elects to take advantage of an exemption, the developer is responsible for maintaining records to demonstrate that the requirements of the exemption have been met." 24 C.F.R. § 1710.4(d) (1987). The appellants have offered no evidence in support of their claim and, therefore, we find it without merit.

Finally, appellants argue that the trial court abused its discretion in refusing to consider three affidavits and a deposition filed after the March 30, 1986, hearing on the cross-motions for summary judgment. Their argument is essentially that the trial court granted leave to the investors to file additional affidavits after this date but refused

to offer a similar opportunity to the developers.

After reviewing the record, we find that the trial court decided during the March 20 hearing to grant the investors' motion for summary judgment and thereafter granted them leave to file additional affidavits regarding the proper amount of attorney fees to be awarded under 15 U.S.C. § 1709(c). The developers did not offer below, or here, any reason for their delay in filing the affidavits and deposition. Such an offer is required in order to justify a request for a continuance to file additional affidavits under A.R.Civ.P. 56(f). The circuit court was not obligated to grant leave to the developers to file additional affidavits regarding the applicability of the Act. Under these circumstances, we see no abuse of discretion in refusing leave to file additional affidavits or depositions.

For the reasons stated above, the judgment of the circuit court is affirmed.

AFFIRMED.

Torbert, C. J., and Maddox, Beatty, and Houston, JJ., concur.

ORDER DENYING REHEARING

MAILING ADDRESS:
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OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

RE: 85-1239

N & C PROPERTIES, ET AL.

Appellant

vs. CHARLES D. PRITCHARD, ET AL.

Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

_____ Appell___ granted 7 additional days to file briefs to and including

_____	Appellant(s) granted 7 additional days to file reply briefs to and including
_____	Record on Appeal filed
_____	Appendix Filed
_____	Submitted on Briefs
_____	Petition for Writ of Certiorari denied. No opinion.
XXXX	Application for rehearing overruled. No opinion written on rehearing. Per Curiam - Torbert, CJ., Maddox, Almon, Beatty & Houston, JJ., concur.
_____	Permission to file amicus curiae briefs granted
_____	

4/22/88
bsa

/s/ Robert G. Esdale
Robert G. Esdale, Clerk
Supreme Court of Alabama

STATUTORY PROVISIONS

15 U.S.C. § 1701(3)

(3) "subdivision" means any land which is located in any State or in a foreign country and is divided or is proposed to be divided into lots, whether contiguous or not, for the purpose of sale or lease as part of a common promotional plan;

15 U.S.C. § 1701(4)

(4) "common promotional plan" means a plan, undertaken by a single developer or a group of developers acting in concert, to offer lots for sale or lease; where such land is offered for sale by such a developer or group of developers acting in concert, and such land is contiguous or is known, designated, or advertised as a common unit or by a common name, such land shall be presumed, without regard to the number of lots covered by each individual offering, as being offered for sale or lease as part of a common promotion plan;

15 U.S.C. § 1701(11)

(11) "offer" includes any inducement, solicitation, or attempt to encourage a person to acquire a lot in a subdivision.

15 U.S.C. § 1702(b)

(b) **Sale or lease of lots subject to other statutory registration and disclosure requirements.** Unless the method of disposition is adopted for the purpose of evasion of this title (15 USCS §§ 1701 et seq.), the provisions

requiring registration and disclosure (as specified in section 1404(a)(1) and sections 1405 through 1408)(15 USCS §§1703(a)(1) and 1704-1707) shall not apply to --

(1) the sale or lease of lots in a subdivision containing fewer than one hundred lots which are not exempt under subsection (a);

15 U.S.C. § 1703

(a) Prohibited activities. It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails--

(1) with respect to the sale or lease of any lot not exempt under section 1403 (15 USCS § 1702)--

(A) to sell or lease any lot unless a statement of record with respect to such lot is in effect in accordance with section 1407 (15 USCS § 1706);

(B) to sell or lease any lot unless a printed property report, meeting the requirements of section 1408 (15 USCS § 1707), has been furnished to the purchaser or lessee in advance of the signing of any contract or agreement by such purchaser or lessee;

15 U.S.C. § 1704(a)

(a) Filing a statement of record. A subdivision may be registered by filing with the Secretary a statement of record, meeting

the requirements of this title (15 USCS §§ 1701 et seq.) and such rules and regulations as may be prescribed by the Secretary in furtherance of the provisions of this title (15 USCS §§ 1701 et seq.). A statement of record shall be deemed effective only as to the lots specified therein.

15 U.S.C. § 1705

Information required in statement of record

The statement of record shall contain the information and be accompanied by the documents specified hereinafter in this section--

(1) the name and address of each person having an interest in the lots in the subdivision to be covered by the statement of record and extent of such interest;

(2) a legal description of, and a statement of the total area included in, the subdivision and a statement of the topography thereof, together with a map showing the division proposed and the dimensions of the lots to be covered by the statement of record and their relation to existing streets and roads;

(3) a statement of the condition of the title to the land comprising the subdivision, including all encumbrances and deed restrictions and covenants applicable thereto;

(4) a statement of the general terms and conditions, including the range of selling prices or rents at which it is proposed to dispose of the lots in the subdivision;

(5) a statement of the present condition of access to the subdivision, the existence of any unusual conditions relating to noise or safety which affect the subdivision and are known to the developer, the availability of sewage disposal facilities and other public utilities (including water, electricity, gas, and telephone facilities) in the subdivision, the proximity in miles of the subdivision to nearby municipalities, and the nature of any improvements to be installed by the developer and his estimated schedule for completion;

(6) in the case of any subdivision or portion thereof against which there exists a blanket encumbrance, a statement of the consequences for an individual purchaser of a failure, by the person or persons bound, to fulfill obligations under the instrument or instruments creating such encumbrance and the steps, if any, taken to protect the purchaser in such eventuality;

(7)(A) copy of its articles of incorporation, with all amendments thereto, if the developer is a corporation; (B) copies of all instruments by which the trust is created or declared, if the developer is a trust; (C) copies of its articles of partnership or association and all other papers pertaining to its organization, if the developer is a partnership, unincorporated association, joint stock company, or any other form of organization; and (D) if the purported holder of legal title is a person other than developer, copies of the above documents for such person;

(8) copies of the deed or other instrument establishing title to the subdivision in the developer or other person and copies of any instrument creating a lien or encumbrance upon the title of developer or other person or copies of the opinion or opinions of counsel in respect to the title to the subdivision in the developer or other person or copies of the title insurance policy guaranteeing such title;

(9) copies of all forms of conveyance to be used in selling or leasing lots to purchasers;

(10) copies of instruments creating easements or other restrictions;

(11) such certified and uncertified financial statements of the developer as the Secretary may require; and

(12) such other information and such other documents and certifications as the Secretary may require as being reasonably necessary or appropriate for the protection of purchasers.

15 U.S.C. 1709(a)

(a) Violations; relief recoverable. A purchaser or lessee may bring an action at law or in equity against a developer or agent if the sale or lease was made in violation of section 1404(a) (15 USCS § 1703(a)). In a suit authorized by this subsection, the court may order damages, specific performance, or such other relief as the court deems fair, just, and equitable. In determining such relief the court may take into account, but not be limited

to, the following factors: the contract price of the lot or leasehold; the amount the purchaser or lessee actually paid; the cost of any improvements to the lot; the fair market value of the lot or leasehold at the time relief is determined; and the fair market value of the lot or leasehold at the time such lot was purchased or leased.

CASE NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1988 TERM

N & C PROPERTIES; NEDA, INC. OF DESTIN; AND CHANCELLOR LAND CO., INC.,

PETITIONERS,

V.

CHARLES D. PRITCHARD, ET AL,

RESPONDENTS.

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of July, 1988, three copies of the Petition for Writ of Certiorari were mailed first-class, postage prepaid, to Rodney B. Slusher, 425 North Court Street, Florence, Alabama 35630, counsel for respondents. I further certify that all parties required to be served have been served. I further certify that I am a member of the bar of this court and hereby enter my appearance as counsel for petitioners in this case.

Charles D. Cleveland
Attorney for Petitioners

(2)

No. 88-231

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

N & C PROPERTIES; NEDA, INC. OF DESTIN;
AND CHANCELLOR LAND CO., INC.,
Petitioners,

vs.

CHARLES D. PRITCHARD, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of The United States

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Interstate Land Sales Full Disclosure Act (ILSA) applies to condominium sales.

2. Whether the Alabama state courts correctly denied the application of the 100 lot exemption (15 U.S.C. 1702(b)(1)) under the facts of this case.

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No. 88-231

IN THE

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STATUTES AND REGULATIONS INVOLVED

In addition to the provision cited in the Petition for Writ of Certiorari and Appendix thereto, the following authority is germane to the resolution of this case:

24 C.F.R. § 1710.1 Definitions

"Lot" means any portion, piece, division, unit, or undivided interest in land located in any state or foreign country if the interest includes the right to the exclusive use of a specific portion of the land.

24 C.F.R. § 1710.5 Statutory Exemptions From Provisions of This Chapter

The requirements of the Act do not apply to —

(a) The sale or lease of lots in a subdivision containing fewer than 25 lots;

(b) The sale or lease of any improved land on which there is a residential, commercial, condominium, or industrial building, or the sale or lease of land under a contract obligating the seller or lessor to erect such a building thereon within a period of two years. In the case of condominium or multiunit construction, a presale clause conditioning the sale of a unit on certain percentage of sales of other units is permissible if it is legally binding on the parties and it is for a period not to exceed 180 days. However, the 180-day provision cannot extend the two-year period for performance. The permissible 180 days is calculated from the date the first purchaser signs a sales contract in the project or, if a phased project, from the date the first purchaser signs the first sales contract in each phase.

Respondents have also set out in the Appendix to this Brief the pertinent regulatory announcements covering the issues in this appeal. They are 38 Fed. Reg. 23,866 (1973); 39 Fed. Reg. 7824 (1974); and 44 Fed. Reg. 24,010 (1979).

STATEMENT OF THE CASE

In the interest of brevity, Respondents will not submit a separate statement of the case. Respondents do wish to clarify one particular point. In raising the Second Question, Petitioners focus on the application of the "common promotional plan" aspect of Section 1701(4). The Alabama Supreme Court in reviewing the trial court decision was essentially reviewing a factual determination made by a lower court. The Alabama Supreme Court noted numerous factual aspects of the appellate record which supported the lower court decision. Among them were:

(1) That Neda, Inc., was formed to promote and sell units in both Phase I and Phase II; (2) The project was advertised, represented, and marketed as a two-phase project consisting of two individual towers adjoining each other, Phase I containing 55 units and Phase II containing 46 units; and (3) The project was advertised and intended by the owners to be a two-phase project containing over 100 units. The investors offered the sworn testimony of Authur Hill, president of Gulf South Corridor Properties, and Winston Biggs, president of Chancellor Land Company, Inc., in support of their claim during the hearing on March 20, 1986. The testimony of both men was that the development was advertised, represented, and marketed as a two-phase project containing two towers. The towers were to be adjacent to one another, sharing a common lobby and beach front. Mr. Biggs testified that the Johnsons were promised the opportunity to trade their Phase I unit for a nicer unit in Phase II when it was completed.

A prospectus covering the development was, however, prepared by the developers, and it was admitted into evidence at the March 20 hearing. It was denominated "East Pass Towers Condominium Declaration," with the cover depicting twin towers on the Destin coast. Phase I of the development was to be completed by June 1, 1992. The maximum number of units in the development was to be 101 "if, in the sole discretion of the developer, Phase II is built." The prospectus also said, "The developer has reserved the right to construct additional apartment buildings . . . as part of this condominium at any time prior to June 1, 2002 . . . . The Additional units to be constructed will be 46 in number and would be contained in an additional apartment building." Advertising brouchures admitted into evidence at the hearing also depicted twin towers jointed by a common lobby.

N & C Properties v. Pritchard, 525 So.2d 1346, 1349 (Ala. 1988).

SUMMARY OF ARGUMENT

1. This case involves the interpretation of the term "lots" as defined within the Interstate Land Sales Full Disclosure Act (ILSA). From the inception of this legislation in 1968, the legislative history clearly evidenced an intent that ILSA apply to the sales of condominium units. The legislative history was consistent with both the statutory interpretation given to this term by the agency charged with the statute's enforcement as well as Congressional acceptance of the coverage of condominiums when the statute was amended several years later implementing an exception to the regulatory scheme. The decision of the Alabama Supreme Court to apply the statute to the sale of condominium units was also consistent with a chorus of federal and state decisions confirming this result. Against this background the Petition lacks the substantial federal question necessary to justify review by this Court.

The fact that the Alabama Supreme Court reviewed a lower court application of the "common promotional plan" does not yield the conclusion that the decision was "inconsistent" with the other authorities. The Alabama Supreme Court was not erroneous in its conclusion that this was a factual issue. The Appellate Record amply documented the factual conclusion that the condominium project was part of a "common promotional plan". Unlike petitioners' portrayal, there is a complete absence of any conflict involving a substantial federal question.

This Court should deny the requested writ.

ARGUMENT

I. The Interstate Land Sales Full Disclosure Act (ILSA) applies to condominium sales.

It is now well-settled that the Interstate Land Sales Full Disclosure Act applies to the sale of condominium units. This conclusion is aptly drawn from the legislative history of the Act, the statutory construction applied by agency charged with administering its provisions, as well as Congressional acceptance of this result, and both federal and state caselaw. With the exception of a single federal district court decision, which was reversed on appeal, all courts have applied the Act to the sale of condominium units.

A. Legislative History

The Interstate Land Sales Full Disclosure Act (ILSA) was originally enacted as part of the Housing and Urban Development Act of 1968. The disclosure aspects of this legislation was designed to prevent false and deceptive practices in the interstate sale of tracts of land by requiring developers to disclose information needed by potential buyers to evaluate their purchases. *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 778 (1976). The legislation was principally directed at protecting purchases from abuse by real estate developers involved in interstate commerce who used the mails in the promotions and sales of their projects. *Nargiz v. Henlopen Developers*, 380 A.2d 1361, 1362 (Del. 1977). The legislative history of the Act indicates that Congress was concerned with the sale of a multiple, undeveloped lots pursuant to a common promotional plan. Conf.Rep. No. 1785, 90th Cong., 2nd Sess. (1968), reprinted in 1968 U.S. Code Cong. and Ad. News 3053, 3066. In essence, ILSA is an antifraud statute that utilizes the requirement of disclosure as its primary tool.

The key term in the statutory scheme is "lot". The ILSA is triggered when there is a proposed sale of a non-exempt "lot".

This term is not defined in the legislation. The Secretary of Housing and Urban Development (HUD) has by regulation defined "lot" as "any portion, piece, division, unit, or undivided interest in land located in any state or foreign country if the interest includes the right to the exclusive use of a specific portion of the land." 24 CFR §1710.1 (1987).

Almost from the outset of passage of the ILSA there were questions raised as to whether the Act applied to condominium developments.[1] In 1972, the Office of Interstate Land Sales Registration issued an Asvisory Opinion which noted:

> We agree that the key term is "lots" in determining whether the sale of a condominium unit can be equated with the sale of a lot in the subdivision within the meaning of the Act. We do not, however, agree that the concepts and characteristics of a lot and a condominium unit are mutually exclusive and that, therefore, a "unit" in a condominium cannot be considered a "lot".

OILSR Exemption Advisory Opinion, No. 1701.1(k) at p. 5 (August 20, 1972). Shortly after issuing the Advisory Opinion, the Secretary of Housing and Urban Development responded to builders' concerns about the application of ILSA to condominiums.

> The application of the Act to condominiums has been consistent OILSR policy since the issue was first raised in 1969. The bases for this position are that condominiums carry the indicia of and in fact are real estate, whether or not the units therein have been constructed. A condominium is accordingly viewed by OILSR as equivalent to a subdivision, each unit being a lot. Adverse comment, particularly from builders, asserts that condominiums are

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[1]The office of Interstate Land Sales Registration (OILSR) is the organization designated by the Secretary of Housing and Urban Development to administer the Act. See 15 U.S.C. §1715 (a)(1982).

> equivalent to houses and the sale of houses was not intended to be covered by the act. However, the right to condominium space is a form of ownership, not a structural description. This condominium concept is employed as an ownership form for completely horizontal developments and even for campgrounds. Congress recognized the need to exempt professional builders from the Act and provided an appropriate exemption. (15 U.S.C. 1702[(a)(2)]). For a condominium unit sale to be exempted from the Act, it must accordingly qualify for exemption; i.e., either it must be completed before it is sold, or it must be sold under a contract obligating the seller to erect the unit within two years from the date the purchaser signs the contract of sale.

38 Fed. Reg. 23,866 (1973). Less than one year later the Office of Interstate Land Sales Registration issued an announcement emphasizing the application of ILSA to sales of condominium units:

> The Office of Interstate Land Sales Registration (OILSR) offers guidelines in re-emphasizing attention to the applicability of the federal land sales registration laws to the offer and sale of condominiums and other structures. The Preamble to OILSR regulations published on September 4, 1973 (38 FR 23866 et seq.) points out that condominiums are covered by the Act in that a condominium is equivalent to a subdivision, each unit being a lot.

39. Fed. Reg. 7824. The OILSR pronouncements, applying ILSA to condominium sales, has become the accepted view. See 15A AmJur 2d, Condominiums 20; Rohan and Reskin, Condominium Law and Practice (Matthew Bender 1976) 18A.02; "Condominium Regulation: Beyond Regulation," 123 U. of Pa.L.Rev. 639, 660.

In 1978, Congress considered amendments to ILSA which are historically important in constructing the statute. At that time,

the Act only exempted sales of improved land on which there was a residential, commercial, or industrial building or where the seller was obligated to complete such a structure within two years. Congress amended this provision to explicitly exempt condominium sales under the same situations, thus inserting the word "condominium" in the only place in the Act.[2] 15 U.S.C. §1702(a)(2) as amended by P.L. 95-557, 907(a)(1). The accompanying Senate Committee Report observed:

> Section 715(b)(1) of the bill would amend Section 1403(a)(2) [now §1702(a)(2)] of the act to provide an exemption for the sale or lease of any improved land on which there is a condominium or on which a condominium is to be built within two years. Section 1403(a)(2) presently provides an exemption for land on which there is or will be built within 2 years, a residential, commercial, or industrial building. Present HUD regulations do not provide an exemption for condominiums.

Housing and Community Development Amendments of 1978, Report of the Committee on Banking, Housing and Urban Affairs, United States Senate (Report No. 95-871, at page 97.) The Conference Committee also noted:

> The Interstate Land Sales Full Disclosure Act is amended to broaden the exemptions to include sale or lease of land on which there is a condominium building on or which a condominium building is to be built within two years.

Public Law 95-557, Summary of the Act, Joint Explanatory Statement of Managers of the Committee of Conference at page 80. The formal regulations implementing this amendment succinctly state:

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[2] The term "condominium" refers to a form of real estate ownership, rather than to any particular type of structure. *See* 38 Fed. Reg. 23,866 (1973)

> The sale or lease of any improved land on which there is a residential, commercial, condominium or industrial building, or the sale or lease of land under a contract obligating the seller or lessor to erect such a building thereon within a period of two years. In the case of condominium or multi-unit construction, a presale clause conditioning the sale of a unit on a certain percentage of sales of other units is permissible if it is legally binding on the parties and it is for a period not to exceed 180 days. However, the 180-day provision cannot extend the two-year period for performance. The permissible 180 days is calculated from the date the first purchaser signs a sales contract in the project or, if a phased project, from the date the first purchaser signs the first sales contract in each phase.

24 CFR §1710.5(b) (1987).

Consistently, since the adoption of ILSA in 1969, both Congress and the administrative agency charged with enforcing the law have acknowledged that condominium sales fall within the statutory scheme of the statute.

B. Statutory Construction.

The task before the court in considering the Petition is made relatively easy in this instance. Not only does the legislative history of ILSA provide an adequate foundation for concluding that the statutory term "lots" includes interests in condominium units, simple rules of statutory construction also dictate this conclusion.

When confronted with a problem of statutory interpretation, the Court has indicated a "great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall v. Tallman,* 380 U.S. 1, 16 (1965). This precept of statutory construction is especially applicable when the administrative interpretation "includes a contemporaneous

construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the part work efficiently and smoothly while they are yet untried and new." *Power Reactor Dev. Co. v. International Union of Electricians*, 267 U.S. 396, 408 (1961). If the statutory provision is silent or ambiguous with respect to a specific issue addressed by a valid regulation, the reviewing court must give deference to the agency's interpretation unless it conflicts with the statute's plain meaning. *K Mart Corp. v. Cartier, Inc.*, ____U.S. ____, 108 S.Ct. 1811 (1988); *EEOC v. Commercial Office Products, Co.*, ____U.S. ____, 108 S.Ct. 1666 (1988). Stated otherwise, the construction placed upon the term "lots" by OILSR does not have to be the only reasonable one, or the one that would have been made in a judicial proceeding. The Court only needs to conclude that the administrative agency has made "*a* reasonable interpretation of the relevant provisions." *Amer. Paper Inst. v. Amer. Power Serv. Corp.*, 461 U.S. 402, 423 (1983) (empahsis in original). *See also EPA v. National Crushea Stone Ass'n.*, 449 U.S. 04, 04 (1980).

The legislative history of ILSA clearly indicates that OILSR, the federal body charged with administering the Act, has consistently maintained that condominium sales fall within the statutory provisions.[1] *See* 38 Fed. Red. 23, 866 (1973); 39 Fed. Reg. 7824 (1974). Nothing contained within the Petition urges that this was not *a* reasonable interpretation. The Eleventh Circuit in *Winter v. Hollingsworth Properties, Inc.*, 777 F.2d 1444 (11th Cir. 1985) confirmed this aspect of ILSA by noting:

> It is reasonable to conclude as HUD did, that the term "lot" was used to refer generally to interests in realty. The legislative history supports this construction, employing the terms "lot," "land," and "real estate" in discussing the Act. This construction is also reasonable in terms of the purpose of the statute. A fraudulent out-of-state sale

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[1] The existence of a consistently held agency view interpreting a statute is an important consideration. *See Immigration & Naturalization Service v. Cardoza-Fonseca*, ____ U.S. ____, 107 S.Ct. 1207 (1987).

> of land is not rendered any less fraudulent if the condominium form of ownership is utilized.

Id. at 1448. *See also Schatz v. Jockey Club Phase III, Ltd.*, 604 F.Supp. 537, 540-41 (S.D. Fla. 1985); *Nargiz v. Henlopen Developers*, 380 A.2d 1361, 1364 (Del. 1977); *Appalachain, Inc. v. Olson*, 468 So.2d 266, 268 (Fla. App. 2 Dist. 1985). The Petition is noteworthy in its silence as to the statutory construction placed on the ILSA by the OILSR.

The conclusion that the sale of condominium units falls within the parameters of ILSA is also confirmed by analyzing the impact of the 1978 amendments. The 1978 amendments sought to specifically exclude condominiums that would be constructed within two years. Congress obviously would not specifiacally exempt this class of condominium projects if the Act did not in the first instance apply to condominiums as "lots". This conclusion is bolstered by the realization that Congress is presumed to be aware of an administrative interpretation of a statute when it legislates modifications. *Lorilland, Inc. v. Pons*, 434 U.S. 575, 580 (1978). The amendment enacted by Congress apparently constituted an implied recognition of the ILSA coverage to condominium sales. The Eleventh Circuit reached this conclusion by recognizing:

> The obvious conclusion to be drawn from this history is that Congress was aware of HUD's interpretation that the Act covered condominium sales and acted to exempt such sales where the building is existing or must, by contract, be completed within two years. If the ILSA did no include the sale of condominiums within its scope, it would be senseless to provide for exclusion of such sales under prescribed conditions. We therefore conclude that Congress was aware of, and approved of, HUD's construction of the Act and hold that the ILSA is applicable to the sale of condominiums.

Winter, 777 F.2d 1444, 1449 (1985). The Petition while recognizing the historical sequence of Congressional action offers no explanation for a contrary interpretation. Following the

argument of Petitioners, the 1978 amendment would have been superfluous. The Court should avoid am interpretation that leads to this result.

C. Federal and State Caselaw

The Petitions's weakest argument involves its attempt to justify a substantial federal question under Section 1257 in view of the existing federal and state caselaw. The Petition claims that "a majority of the courts" have found ILSA to apply to condominium is a misnomer. With the exception of one federal district court case, which was reversed on appeal, *every* federal and state decision has upheld the application of ILSA to condominium sales.

The Eleventh Circuit is the only federal appellate court to discuss this issue. In *Eaton v. Dorchester Development, Inc.*, 692 F.2d 727 (11th Cir. 1982) the panel in reviewing a dismissal order assumed, without discussion, that ILSA applied to condominium sales. Later, in *Winter v. Hollingsworth Properties, Inc.*, 777 F.2d 1444 (11th Cir. 1985) - the principal federal authority relied upon by both the trial and appellate courts in Alabama - a different panel specifically held LISA applicable to the sale of condominiums. Thus, the Eleventh Circuit reversed the *only* reported decision to hold that ILSA did not apply to condominium sales. The decisions of all federal district courts also confirm the application of ILSA to condominium dales. (1) *Schatz v. Jockey Club Phase III, Ltd.*, 604 F.Supp. 537 (S.D. Fla. 1985); *Inversions Romar, S.A. v. Jockey Club Phase III, Ltd.*, No. 82-0695 CIV-JE (S.D. Fla. September 18, 1984); *Mosher v. Southridge Associates, Inc.*, 552 F.Supp. 1226 (W.D.Pa. 1982)(applying two year exemption).

Petitioners also can find little solace in state caselaw. *Every reported decision has upheld the application of ILSA to the sale of condominium units. Berzon v. Oriole Homes Corp.*, 497 So.2d 670 (Fla.App. 4 Dist. 1986); *Star Island Associates v. Lichter*, 473 So.2nd 791 (Fla.App. 2nd Dist. 1985); *Marco Bay*

Associates v. Vandewalle, 472 So.2d 472 (Fla. App. 2 Dist. 1985); *Appalachian, Inc. v. Olson*, 468 So.2d 266 (Fla.App. 2 Dist. 1985); *Grove Towers, Inc. v. Lopez*, 467 So.2d 358 (Fla.App. 3 Dist.), *rev. denied*, 480 So.2d 1294 (Fla. 1985); *Finst Dev., Inc. v. Bahaor*, 449 So.2d 292 (Fla.App. 3 Dist. 1984); *Nargiz v. Henlopen Developers*, 380 A.2d 1361 (Del. 1977).

The decision of the Alabama Supreme Court being challenged by this Petition is in accord with not only the federal caselaw for the Circuit but also every other appellate decision to discuss this question.

The Petition's contention that jurisdiction in this case is necessary is a most untennable one. There is a complete absence of any substantial federal question. The decision of the Alabama Supreme Court is consistent with the legislative history of the Act as well as supportable by tenets of statutory construction. Further, the Petition is unable to cite a single federal or state decision which is contrary authority to the legal conclusion reached by the Alabama Supreme Court. The present Petition does not raise a substantial federal question.

II. The Alabama state courts correctly denied the application of the 100 lot exemption under the facts of this case.

The basic argument advanced on behalf of Petitioners, while presented under the guise of a "conflict of decisions," is in reality only a dispute over how the factual situations in three separate cases were resolved. An examination of the decision of the Alabama Supreme Court demonstrates that there is the absence of any real conflict that would be subject to review by this Court. The "sheeps clothing" blanketing this issue is readily discernable when the cases cited are examined.

The basic foundation of Petitioners' assertion includes the application of the "common promotional plan" as set forth in Section 1701(4).

> [A] plan, undertaken by a single developer or a group of developers acting in concert, to offer lots for sale or lease; where such land is offered for sale by such a developer or group of developers acting in concert, and such land is contiguous or is known, designated, or advertised as a common unit or by a common name, such land shall be presumed, *without regard to the number of lots covered by each individual offering*, as being offered for sale or lease as part of a common promotion plan."

15 U.S.C. 1701(4) (emphasis added). The Alabama Supreme Court was not the first appellate case to review the application of this provision. In addition to the decision of the Alabama Supreme Court, the "common promotion plan" has been applied in three reported decisions.

The Eleventh Circuit briefly addressed the "common promotion plan" in *Eaton v. Dorchester Development, Inc.*, 692 F.2d 727 (11th Cir. 1982). Judge Vance in authoring the Panel's decision acknowledged the application of Section 1701(4) to the facts of the complaint when he noted:

> [Plaintiffs] contended that Defendants had acted in concert with another developer, Power Corporation, to develop the Dorchester as part of a project which included a second condominium, the Grosvenor.
>
> Plaintiffs submitted a promotional brochure in which Power Corporation referred to itself as the "owner/developer/builder" of both the Dorchester and the Grosvenor and stated that the Grosvenor was continuing the "standard of excellence" that Power Corporation had begun several years ago with the Dorchester. They also submitted a magazine advertisement in which a realtor, Power Realty, Inc., promoted "Power Corporation Luxury Condominiums", including the Dorchester and the Grosvenor. Finally, plaintiffs submitted copies of status sheets from the Florida Department of State show-

> ing that Power Corporation and the Dorchester had the same president and director and the same registered office.

Id. at 729. The Panel confirmed that based upon the allegations of the complaint, a cause of action was stated under the "common promotion plan" and that defendants were not exempted solely because part of the project only involved eighty-six units. The Alabama Supreme Court cited *Eaton* in authoring its affirmance. 525 So.2d 1346, 1349-50.

A similar conclusion based upon the facts of the case was reached in *Grove Towers, Inc. v. Lopez*, 467 So.2d 358 (Fla. App. 3 Dist. 1985). In this case, the court confirmed the application of the "common promotional plan" to a proposed project totalling 108 units in the condominium documents while only 98 units were "intended." *Id.* at 361. Again, *Grove Towers* indicated that individual facts of that case were being reviewed. Nothing contained in the decision of the Alabama Supreme Court decision could even be remotely characterized as "inconsistent" with this opinion. Petition at p. 23.

The guise of Petitioners' assertion is further revealed in an examination of *Dunaway v. Lewis*, 554 P.2d 110 (Okla. Ct.App. 1976) - the other case which Petitioners allege is "inconsistent" with the decision of the Alabama Supreme Court. In *Dunaway*, the Court of Appeals of Oklahoma reviewed a jury verdict in favor of the defendant. At trial, plaintiff had claimed the existence of a "common promotional plan." The jury found in favor of the defendant on this issue. The appellate court aptly noted:

> In the case at bar the defendant produced evidence that Lakeside North Second was not a part of the same promotional plan as Lakeside North. Although his evidence that the developments were not contiguous and were created at different times are not necessarily persuasive, the disparate forms of advertising used by the defendant create a valid question of fact whether Lakeside North Second was or

> was not a part of a common promotional plan with Lakeside North. The fact was properly reserved for the jury.

Id. at 112. *Dunaway*, was another authority relied upon by the Alabama Supreme Court in rendering its opinion. 525 S.2d at 1349-50.

Quite apart from being "inconsistent" with these authorities, the Alabama Supreme Court in reviewing a trial court factual determination, affirmed the lower disposition noting that the relevant statutory provisions were correctly applied. The Court cited at length the factual record that support the determination of a "commonal promotional plan." As noted by Justice Almon:

> The investors' argument below and on appeal is that the developers offered to sell units in Phase I and Phase II as a common plan to development. In support of their argument, the point to the following factors: (1) That Neda, Inc., was formed to promote and sell units in both Phase I and Phase II; (2) The project was advertised, represented, and marketed as a two-phase project consisting of two individual towers adjoining each other, Phase I containing 55 units and Phase II containing 46 units; and (3) The project was advertised and intended by the owners to be a two-phase project containing over 100 units. The investors offered the sworn testimony of Arthur Hill, president of Gulf South Corridor Properties, and Winston Biggs, president of Chancellor Land Company, Inc., in support of their claim during the hearing on March 20, 1986. The testimony of both men was that the development was advertised, represented, and marketed as a two-phase project containing two towers. The towers were to be adjacent to one another sharing a common lobby and beach front. Mr. Biggs testified that the Johnsons were promised the opportunity to trade their Phase I unit for a nicer unit in

> Phase II when it was completed. He also testified, and it was undisputed by the appellants, that none of the purchasers in this suit was presented with a prospectus prior to the execution of their preconstruction purchase agreements.
>
> A prospectus covering the development was, however, prepared by the developers, and it was admitted into evidence at the March 20 hearing. It was denominated "East Pass Towers Condominium Declaration," with the cover depicting twin towers on the Destin coast. Phase I of the development was to be completed by June 1, 1992. The maximum number of units in the development was to be 101 "if, in the sole discretion of the developer, Phase II is built." The prospectus also said, "The developer has reserved the right to construct additional apartment buildings... as part of this condominium at any time prior to June 1, 2002.... The additional units to be constructed will be 46 in number and would be contained in an additional apartment building." Advertising brochures admitted into evidence at the hearing also depicted twin towers joined by a common lobby.
>
> *Id.* at 1348-49.

Without question, the Alabama Supreme Court correctly applied prevailing standards of review under Alabama law to what was in all respects a factual determination. There is dubious merit to Petitioners' assertion that the Alabama Supreme Court decision was "inconsistent" with *Dunaway* or *Grove Towers*. Any alleged conflict giving rise to claim for jurisdiction before this Court is at best illusory. There is no real conflict on the application of law or fact between the underlying facts of this case and how the trial court resolved them or between the authority of the Alabama Supreme Court and any other decision cited by Petitioners. The Court should deny the writ of certiorari.

CONCLUSION

In light of the foregoing, it is clear that:

1. The legislative history of Interstate Land Sales Full Disclosure Act applies to the sale of condominium units.

2. Precepts of statutory construction confirm that the Interstate Land Sales Full Disclosure Act applies to the sale of condominium units.

3. Except for one case which was reversed on appeal, all reported decisions, both federal and state, have held that the Interstate Land Sales Full Disclosure Act applies to the sale of condominium units.

4. There is an absence of any substantial federal question as to whether the Interstate Land Sales Full Disclosure Act applies to the sale of condominium units.

5. There is nothing in a review of the caselaw, applying the common promotional plan to indicate that the decision of the Alabama Supreme Court conflicts with other authorities.

WHEREFORE, Respondents urge this Court to deny the requested Writ of Certiorari.

DONE AND DATED this 19th day of August, 1988.

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APPENDIX

APPENDIX

STATUTORY PROVISIONS

15 U.S.C. 1702(a)

(a) Unless the method of disposition is adopted for the purpose of evasion of this chapter, the provisions of this chapter shall not apply —

(1) the sale or lease of lots in a subdivision containing less than twenty-five lots;

(2) the sale or lease of any improved land on which there is a residential, commercial, *condominium*, or industrial building, or the sale or lease of land under a contract obligating the seller or lesser to erect such a building thereon within a period of two years.

AGENCY REGULATIONS

24 C.F.R. §1710.1 Definitions

"Lot" means any portion, piece, division, unit, or undivided interest in land located in any state or foreign country if the interest includes the right to the exclusive use of a specific portion of the land.

24 C.F.R. §1710.5 Statutory Exemptions From Provisions of This Chapter

The requirements of the Act do not apply to—

(a) The sale or lease of lots in a subdivision containing fewer than 25 lots;

(b) The sale or lease of any improved land on which there is a residential, commercial, *condominium*, or industrial building, or the sale or lease of land under a contract obligating the seller or lessor to erect such a building thereon within a period of two years. In the case of *condominium* or multiunit construction, a

presale clause conditioning the sale of a unit on a certain percentage of sales of other units is permissible if it is legally binding on the parties and it is for a period not to exceed 180 days. However, the 180-day provision cannot extend the two-year period for performance. The permissible 180 days is calculated from the date the first purchaser signs a sales contract in the project or, if a phased project, from the date the first purchaser signs the first sales contract in each phase.

REGULATORY ANNOUNCEMENTS

Land Registration, Formal Procedures and Advertising Sales Practices, and Posting of Notices of Suspension, 38 Fed. Reg. 23,866 (1973)

Considerable comment was received with respect to the proposed definition of lot. Essentially, comments complained that OILSR is seeking to regulate everything from securities to country club memberships. Since in this range of coverage *condominiums* were mentioned most frequently, OILSR policy on *condominium* coverage is set forth herein.

The application of the Act to *condominiums* has been consistent OILSR policy since the issue was first raised in 1969. The bases for this position are that *condominiums* carry the indicia of and in fact are real estate, whether or not the units therein have been constructed. A *condominium* is accordingly viewed by OILSR as equivalent to a subdivision, each unit being a lot. Adverse comment, particularly from builders, asserts that *condominiums* are equivalent to houses and the sale of houses was not intended to be covered by the Act. However, the right to *condominium* space is a form of ownership, not a structural description. This *condominium* concept is employed as an ownership form for completely horizontal developments and even for campgrounds. Congress recognized the need to exempt professional builders from the Act and provided an appropriate exemption (15 U.S.C. §1702(3)). For a *condominium* unit sale

to be exempted from the Act, it must accordingly qualify for exemption; i.e., either it must be completed before it is sold, or it must be sold under a contract obligating the seller to erect the unit within two years from the date the purchaser signs the contract of sale. For the purposes of the exemption cited, "buildings comprises the dwelling unit and all utilities or systems necessary to support normal occupancy. Additionally, if a *condominium* dwelling unit is merely incidental to the common facilities (as in the case of recreational developments) all common facilities must be completed within the two-year period to qualify for the exemption since frequently vacation sites are sold without assurances that such facilities will be completed. With respect to *condominiums* intended as primary residences in metropolitan areas, registration typically is unnecessary since most professional builders would qualify for the exemption inasmuch as they are able to deliver a completed unit to a purchaser within two years after the contract of sale has been signed.

Further, the legislative history of the Act has been cited as not authorizing coverage of *condominiums*. However, there is negligible legislative history on the present Act and that legislative history with respect to predecessor bills is unclear on this subject. It is OILSR's position that the amended definition of lot merely codifies OILSR's longstanding position on *condominiums* and is a valid exercise of the Secretary's regulatory authority under the Act to implement the provisions thereof.

Condominium and Other Construction Contracts, 39 Fed. Reg. 7824 (1974)

The Office of Interstate Land Sales Registration (OILSR) offers guidelines in re-emphasising attention to the applicability of the federal land sales registration laws to the offer and sale of *condominiums* and other structures. The Preamble to OILSR regulations published on September 4, 1973 (38 FR 23866 et seq.) points out that *condominiums* are covered by the Act in

that a *condominium* is equivalent to a subdivision, each unit being a lot.

George K. Bernstein, Administrator of the Office, reports that many *condominium* developers and trade associations have inquired concerning coverage of *condominium* developments in light of section 1403(a)(3) of the Interstate Land Sales Full Disclosure Act. (Act). That section exempts from registration sales of existing buildings and sales of land under contracts obligating sellers to erect buildings on the land within two years.

Guidelines for Exemptions Available Under the Interstate Land Sales Full Disclosure Act, 44 Fed. Reg. 24012 (1979)

(c) Improved Lots. — (Section 1403(a)(3) (15 U.S.C. 1702(a)(3) and 24 CFR 1710.10(c)).

This Section exempts: (1) the sale or lease of any improved land on which there is a residential, commercial, *condominium*, or industrial building or (2) the sale or lease of land under a contract obligating the seller to erect such a building on the lot within a period of two years.

For a building or unit to be considered complete, it must be physically habitable and usable for the purpose for which it was purchased. A residential structure, for example, must be ready for occupancy and have all necessary and customary utilities extended to it before it can be considered complete.

If you (the developer or seller) are relying on this exemption and the residential, commercial, *condominium* or industrial building is not complete, the contract must specifically obligate you, the seller, to complete such a building within two years, otherwise the sale is not exempt. The two year period begins on the date the purchaser signs the contract. The use of a contract that obligates the buyer to build within two years would not exempt the sale.